Supreme Court, U.S.
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No. 01-1033

IN THE

Supreme Court of the United States

ANITA D. BORLAWSKY,

Petitioner,

v.

TOWN OF WINDHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SCOTT LOSCIUTO

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Counter-Statement of the Case	1
Factual Background	1
Reasons for Denying the Writ	4
I. The Decision Below Does Not Present A Conflict With Respect To The Claims Against Respondent Scott Losciuto.	6
A. There is no conflict with respect to the decision below on ANITA's § 1983 claim.	6
B. There is no conflict with respect to the decision below on ANITA's § 1985(3) conspiracy claim.	7
II. The Decision Below Does Not Present An Important Issue Of Federal Law With Respect To The Claims Against Respondent Scott Losciuto.	8
A. The decision below does not decide an important question of law with respect to the § 1983 claim.	8

Contents

Page

B. The decision below does not decide an important question of law with respect to the § 1985(3) claim. 9

III. The Decision Below Does Not Depart From The Accepted And Usual Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Supervisory Powers. 9

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 6

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 10

Bray v. Alexandria Women's Health Ctr., 506 U.S. 263 (1993) 7, 9

Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252 (1st Cir. 1993) 6

Estate of Cooper v. Leamer, 705 F. Supp. 1081 (M.D. Pa.1989) 7, 9

Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45 (1st Cir. 2000) 6

Hubbard v. United States, 514 U.S. 695 (1995) ... 8

Humphrey v. Court of Common Pleas of York County, Pennsylvania, 640 F. Supp. 1239 (M.D. Pa. 1986) 7

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 6

United States v. Johnston, 268 U.S. 220 (1925) ... 4

Watt v. Alaska, 451 U.S. 259 (1981) 4, 8

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 ..... 6, 8

42 U.S.C. § 1985(3) 5, 7, 9

Rules:

Fed. R. App. P. 35(a) 11

Fed. R. Civ. P. 52(a) 10

Fed. R. Civ. P. 56 10

Fed. R. Civ. P. 56(c) 10

U.S. Sup. Ct. Rule 10 ..... 4, 5, 7, 8

COUNTER-STATEMENT OF THE CASE

Respondent Scott Losciuto has no objection to the Procedural Background set forth in the Petitioner's Statement of the Case. However, Respondent does object to the Factual Background section. Accordingly, Respondent hereby submits a Counter-Statement of the Case. For the sake of convenience, Respondent will use the designations employed by Petitioner in her Petition. *See Petition for Writ of Certiorari* at 2.

FACTUAL BACKGROUND

ANITA and SCOTT were formerly married and are the natural parents of two minor children, JANELLE and JOSEPH. *See Respondent Scott Losciuto's Supporting Statement of Material Facts submitted with Motion for Summary Judgment* ("SMF") ¶ 1. JANETTE is the mother of SCOTT, and the grandmother of JANELLE. *See SMF* ¶ 2. After their divorce, ANITA and SCOTT were given joint custody of JANELLE and JOSEPH, and ANITA was given primary physical residence. *See SMF* ¶ 3. JANELLE and JOSEPH spent a great deal of time with JANETTE. *See SMF* ¶ 4. ANITA and JANETTE were "very close" and had regular contact. *See SMF* ¶ 4.

Several years ago, ANITA and JANELLE took up the sport of "clogging," an Appalachian dance performed competitively. *See SMF* ¶ 5. JANELLE was the Maine State clogging champion and danced with the New England All Star Cloggers. *See SMF* ¶ 5. In July 1997, ANITA and JANELLE attended a clogging convention in Virginia with a group of other teenage girls and adult chaperones. *See SMF* ¶ 6. The group drove down in several vans, including one

driven by ANITA. *See SMF* ¶ 6. It was a hectic trip because there was a hurricane and all the clogging costumes became wet, and because there were problems with the hotel arrangements. *See SMF* ¶ 6.

During the return trip to Maine, ANITA became upset when older girls in her van joked about matters of a sexual nature with JANELLE present. *See SMF* ¶ 7. Subsequently, one of the group's vans broke down in New Jersey. *See SMF* ¶ 7. A "big fight" resulted, and JANELLE ended up driving back to Maine in a separate vehicle from ANITA. *See SMF* ¶ 7.

ANITA returned to Maine on July 30th and picked up JANELLE at JANETTE's house. *See SMF* ¶ 8. ANITA had not slept for two days, except for "little cat naps." *See SMF* ¶ 8. She was angry at JANELLE and had been stressed out for several days. *See SMF* ¶ 8. She talked to JANETTE for about 30 minutes, then impulsively decided to confront JANELLE in JANETTE's bedroom. *See SMF* ¶ 8. Present in the bedroom were ANITA, JANELLE, JANETTE and Julia Losciuto, Scott's baby daughter from his second marriage. *See SMF* ¶ 8. According to JANELLE, ANITA told JANELLE that she could no longer go clogging and called her names such as "fucking cunt" and "ungrateful bitch." *See SMF* ¶ 9. ANITA then laid hands on JANELLE, putting her hands around JANELLE's neck and applying pressure, digging her fingers into JANELLE, and hitting her with an open and closed fist. *See SMF* ¶ 9.

JANETTE corroborates JANELLE's testimony. *See SMF* ¶ 11. She tried to intervene but ANITA shoved her into a corner. *See SMF* ¶ 11. JANETTE did not physically intervene further; rather, she protected her baby granddaughter

Julia because she was concerned about her being injured in the frackas. *See SMF* ¶ 11. She did yell to JOSEPH to call 911, but ANITA ordered him not to do so. *See SMF* ¶ 11. ANITA's story is that she slapped JANELLE only once across the face. *See SMF* ¶ 12.

Although JANELLE initially refused to leave with ANITA, she agreed to do so after JANETTE whispered to her that she would call someone. *See SMF* ¶ 13. JANETTE subsequently called the Windham Police Department and informed them about the altercation between ANITA and JANELLE. *See SMF* ¶ 14. DENBOW responded to the call, and, upon arriving at the home of JANETTE, was informed that ANITA had assaulted JANELLE, had threatened further harm to her children and that she would flee the state with the children if the police were called. *See SMF* ¶ 14.

JANETTE also called SCOTT at work and told him that ANITA had assaulted JANELLE. *See SMF* ¶ 15. SCOTT called the Cumberland County Sheriff's Department, and then went to the Dry Mills Store near where ANITA lived. *See SMF* ¶ 15. ANITA noticed Scott's vehicle, and later walked over to the store. *See SMF* ¶ 15. Two police officers arrived at the store, and conversed with ANITA about what had happened. *See SMF* ¶ 15.

DENBOW contacted the Cumberland County Sheriff's Department to request assistance in locating ANITA. *See SMF* ¶ 16. He was informed that deputy sheriffs had already responded to a call from SCOTT and were with ANITA and her children. *See SMF* ¶ 16. DENBOW then spoke to SCHNUPP, who was with ANITA. *See SMF* ¶ 17. DENBOW explained to SCHNUPP what had been described by JANETTE, and requested that ANITA be placed under arrest

and transported to the Windham Police Department. *See SMF* ¶ 17. DENBOW made this request because he "reasonably felt the assault would continue if the people or the children were still with her." *See SMF* ¶ 17. SCHNUPP arrested ANITA without warrant and transported her to the Windham Police Department where she was turned over to their custody. *See SMF* ¶ 18.

SCOTT brought a protection from abuse action on behalf of JANELLE against ANITA, and a hearing was held on October 3, 1997 in the Maine District Court. *See SMF* ¶ 19. ANITA contends that SCOTT gave false testimony at this hearing concerning details about events from their marriage. *See SMF* ¶ 20. SCOTT denies ANITA's allegations that he or JANETTE lied at the hearing. *See SMF* ¶ 20. Subsequently, the Maine District Court gave SCOTT primary physical residence of JANELLE and JOSEPH. On May 6, 1998, ANITA was found not guilty of assaulting JANELLE.

REASONS FOR DENYING THE WRIT

It has long been the policy of this Court not to grant certiorari merely to correct alleged errors made by other courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see also Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals."). This policy is now codified at Rule 10 of the Rules of the Supreme Court, which indicate the following "character of reasons" to be considered in granting or denying petitions for certiorari to a court of appeals:

- If there is a conflict on an important question of federal law between two courts of appeals, a court of appeals and a state court of last resort, or two state courts of last resort.

- If a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

- If a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory powers.

As more fully set forth below, none of these criteria are met in this case. There is no conflict between the First Circuit's decision below and any other court decision, and Petitioner's argument that "divorced women parents" are a recognized class pursuant to 42 U.S.C. § 1985(3) does not present a compelling issue of federal law. What Petitioner really seeks is correction of allegedly erroneous factual findings or misapplication of properly stated rules of law, which is exactly what Rule 10 forbids. Accordingly, this Court should deny the Petition for a Writ of Certiorari.

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH RESPECT TO THE CLAIMS AGAINST RESPONDENT SCOTT LOSCIUTO.

A. There is no conflict with respect to the decision below on ANITA's § 1983 claim.

With respect to the 42 U.S.C. § 1983 claim, ANITA argues that SCOTT "acquired state actor status" by conspiring with DENBOW to have ANITA arrested. ANITA contends that the decision below granting summary judgment to SCOTT on the § 1983 claim is in conflict with a number of Supreme Court cases. *See Petition* at 17 (*citing, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). A cursory examination of these precedents belies ANITA's claim.

The cases cited by ANITA stand for the proposition that a private party who conspires with a government official acts "under color of state law" for the purposes of § 1983. This rule of law is not in dispute. On this point, the District Court cited *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45 (1st Cir. 2000), which references *Lugar* and *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252 (1st Cir. 1993) in delineating the requirements for determining whether a private person has state actor status under § 1983. *Casa Marie* considered and rejected a plaintiff's argument that a defendant had conspired with a state judge, because the plaintiff had failed to produce evidence to support the conspiracy allegation. *See Casa Marie, Inc.*, 221 F.3d at 259 (*citing Adickes*, 398 U.S. 144).

Similarly, in this case, the District Court granted summary judgment to SCOTT on the § 1983 claim because

ANITA had failed to produce any evidence that SCOTT conspired with DENBOW in procuring her arrest. This decision of the District Court, adopted by the First Circuit, is not "in conflict" with any of the decisions cited by ANITA or any other decision. Despite ANITA's feeble protestations to the contrary, th crux of her Petition is her disagreement with the District Court's finding that there was no genuine issue of material fact regarding her meritless conspiracy allegation. Rule 10 makes it clear, however, that certiorari is not granted when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." ANITA's argument that the decision below conflicts with this Court's decisions should be summarily rejected.

B. There is no conflict with respect to the decision below on ANITA's § 1985(3) conspiracy claim.

ANITA does not argue that the First Circuit's decision below on her claim pursuant to 42 U.S.C. § 1985(3) conflicts with any other court decision. Indeed, ANITA concedes that there is a "dearth of precedent" to support her argument that "divorced women parents" are a recognized class under § 1985(3). *Petition* at 18. In fact, courts considering similar arguments are unanimous in holding that only those classes of persons that have suffered "historically pervasive discrimination" based on "immutable characteristics" are entitled to protection under § 1985(3). *See Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263 (1993) (holding that women seeking abortions are not a protected class); *Estate of Cooper v. Leamer*, 705 F. Supp. 1081 (M.D. Pa.1989) (holding that large families in small towns are not a protected class); *Humphrey v. Court of Common Pleas of York County, Pennsylvania*, 640 F. Supp. 1239 (M.D. Pa. 1986) (holding that divorced fathers are not a protected class).

II. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WITH RESPECT TO THE CLAIMS AGAINST RESPONDENT SCOTT LOSCIUTO.

A. The decision below does not decide an important question of law with respect to the § 1983 claim.

As argued above in section I(A), there is no dispute over the proper standard of law to be applied on the § 1983 claim, i.e., a private party who conspires with a government official acts "under color of state law" for the purposes of § 1983. The gist of ANITA's Petition is really that the court below misapplied this standard. This is not a sufficient basis to grant certiorari to the Supreme Court of the United States. *See* Sup. Ct. R. 10; *Watt*, 451 U.S. at 275 n.5 ("[O]ur certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases."). This Court can only grant a fraction of the thousands of petitions for certiorari it receives every term, and it would be a misuse of its finite resources to grant certiorari merely to review the alleged misapplication of a proper legal standard. *See Watt*, 451 U.S. at 273-74 ("[T]he Court may misuse its scarce resources . . . by granting certiorari without adequate justification."); *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting) ("A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction.").

B. The decision below does not decide an important question of law with respect to the § 1985(3) claim.

ANITA's contention that "divorced or otherwise single women parents" are a protected class under § 1985(3) is similar to the meritless contention advanced in *Estate of Cooper*, 705 F. Supp. at 1088 ("[the] argument that a large family in a small town constitutes a class . . . is frivolous"). ANITA's only assertion for granting certiorari on this issue is that a Supreme Court decision "would affect millions of divorced parents." *Petition* at 17. This argument serves as a reminder that the "class-based animus" requirement fashioned by this Court is designed to prevent § 1985(3) from becoming a font of "general federal tort law." *Bray*, 506 U.S. at 269. The plain fact of the matter is a person's marital status is not an immutable characteristic and is not deserving of protection under § 1985(3). *See, e.g., Bray*, 506 U.S. at 269-70 (holding that women seeking abortion are not protected class).

III. THE DECISION BELOW DOES NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

ANITA argues that the decision below is "so erroneous in both substance and procedure that the supervisory power of the Supreme Court should be invoked to correct the matter." *Petition* at 11, 18-21. The lower court's decision on the "substance" or merits of the Respondents' summary judgment motions is not properly considered in determining whether there has been a departure from the "accepted and

usual course of judicial proceedings." In any event, ANITA's argument that the District Court refused to follow other decisions by District Court judges ignores the obvious fact that only this Court or the First Circuit has the authority to make binding precedent in the District of Maine on issues of federal law. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (noting Ninth Circuit's observation that a district court's decision does not even bind the same judge in a subsequent case).

The procedural flaws alleged by ANITA are that the District Court failed to make sufficient findings of fact in ruling on the summary judgment motions, and that the First Circuit used the same judges that comprised the original panel to rule on her application for rehearing *en banc*. *See Petition* at 19-21. Both of these arguments are clearly lacking in merit.

The Federal Rules of Civil Procedure specifically provide that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule . . . 56." Fed. R. Civ. P. 52(a). Findings of fact are not required on summary judgment motions because a court does not "find facts" under Rule 56, but merely determines if there is a "genuine issue as to any material fact" and whether a party is entitled to a judgment as a matter of law based on the undisputed facts. Fed. R. Civ. P. 56(c). Nevertheless, the District Court issued a thoughtful, lengthy, written decision that set forth its reasoning for granting summary judgment to the Respondents. ANITA's argument that the District Court erred in failing to make findings of fact is specious.

Perhaps even more spurious is ANITA's contention that the First Circuit erred in the selection of judges to consider her request for a rehearing *en banc*. The Federal Rules of Appellate Procedure promulgated by this Court make it clear

that a petition for rehearing *en banc* may be granted only by a "majority of the circuit judges who are in regular active service." Fed. R. App. P. 35(a). The rules do not forbid a judge who served on the original panel from considering a petition for rehearing. Far from departing from the "usual and accepted course of judicial proceedings," the First Circuit complied with the Federal Rules of Appellate Procedure to the letter. ANITA's desperate argument to the contrary is wholly without merit.

CONCLUSION

For all of the foregoing reasons, Respondent Scott Losciuto respectfully requests that this Honorable Court deny this Petition.

Respectfully submitted,

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